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IN THE

Supreme Court of the United States

ARTHUR ANDERSEN LLP,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals For the Fifth Circuit

BRIEF OF AMICUS CURIAE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS CURIAE

The National Association of Criminal Defense Lawyers (NACDL) is a non-profit corporation with more than 11,500 affiliate members in 50 states, including private criminal defense attorneys, public defenders, and law professors. The American Bar Association recognizes the NACDL as an affiliate organization and awards it full representation in the ABA's House of Delegates.

NACDL was founded in 1958 to promote criminal law research, to advance and disseminate knowledge in the area of criminal practice, and to encourage integrity, independence, and expertise among criminal defense counsel. NACDL is particularly dedicated to advancing the proper, efficient, and just administration of justice, including issues involving the role and duties of lawyers representing parties in administrative, regulatory, and criminal investigations. In furtherance of this and its other objectives, the NACDL files approximately 35 *amicus curiae* briefs each year, in this Court and others, addressing a wide variety of criminal justice issues.[1] NACDL has a particular interest in this case because the decision of the Court below could interfere with the ability of NACDL's members to represent their clients, subject NACDL members to punishment for zealous advocacy, and undermine the adversarial process essential to fairness in the criminal justice system.

SUMMARY OF ARGUMENT

The Fifth Circuit's reading of the federal witness tampering provision presents lawyers with the risk of

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[1] Letters of consent have been filed with the Clerk. Pursuant to Rule 37.6, *amicus* states that no counsel for a party authored any part of the brief, and no person or entity other than *amicus* and its counsel made a monetary contribution to the preparation or submission of this brief.

prosecution and imprisonment for doing their jobs. This case illustrates, but does not delimit, the dangers of the court's approach. The government obtained a conviction of Arthur Andersen LLP ("Andersen") for knowing and corrupt obstruction of justice under 18 U.S.C. § 1512(b)(2). The indictment focused on the destruction of documents related to Andersen's auditing work for Enron Corporation. An in-house lawyer and other officials advised Andersen employees to comply with Andersen's established document retention policy, which itself was legal. The lawyer also edited a draft of an internal company memorandum. At the time of the charged offense, these individuals anticipated that the Securities Exchange Commission ("SEC") might investigate, but Andersen had received no subpoena or other notice of a formal investigation regarding Enron's accounting practices.

On appeal, the Fifth Circuit affirmed the conviction. The court held, among other things, that the trial court had properly instructed the jury that a defendant "corruptly persuade[d]" another person, in violation of Section 1512(b), if the persuasion had "an improper purpose." Pet. App. 17a-25a. The court of appeals further upheld the trial court's instruction that "an improper purpose" meant "an intent to subvert, undermine, *or impede* the fact-finding ability of an official proceeding." Pet. App. 21a-22a (emphasis supplied). The trial court had instructed that "[t]he improper purpose need not be the sole motivation for the Defendant's conduct so long as the Defendant acted, at least in part, with that improper purpose." Pet. App. 48a. Thus, as long as intent to impede the fact-finding ability of a government investigation is one of several motivations, a defendant has acted "corruptly."

The ruling below places criminal defense lawyers in peril. When a lawyer represents a client in connection with a potential criminal investigation, one of the lawyer's goals may well be to prevent the government from developing

evidence against the client. Under the court of appeals' sweeping holding, that goal is "improper" and it reflects a "corrupt" purpose. And any action by the lawyer – such as vigorously asserting privileges, or counseling potential witnesses about their rights, or, as here, advising employees about the company's document retention policies and editing draft memoranda – potentially violates the statute if it is motivated even in part by this goal. This overbroad definition of the phrase "corruptly persuades" in Section 1512(b) conflicts with the approach adopted by other Circuits.

If allowed to stand, the decision below will chill criminal lawyers from zealously advocating for their clients. On every close call regarding tactical and legal issues – and on many that are not so close – lawyers will have to weigh in the balance their own potential exposure to criminal liability. The government, with this expanded ability to punish the conduct of defense counsel, will gain the concomitant right to investigate that conduct, with the potential to drive an even greater wedge between lawyer and client. And while 18 U.S.C. § 1515(c) purports to protect "lawful, bona fide legal services," after the Fifth Circuit's decision the safe haven provided by this section is illusory.

This case demonstrates what is at stake. The conduct of Andersen's in-house lawyer was central to the government's case. According to post-conviction interviews with jurors, it was *the* basis for conviction. The result reached by the Fifth Circuit collides with the fundamental premises underlying our system of criminal justice. It is important that the Court resolve this case now to prevent further damage to the rights of defendants and the integrity of the judicial process.

ARGUMENT

I. THE FIFTH CIRCUIT'S INTERPRETATION OF "CORRUPTLY PERSUADES" IS WRONG AND PLACES LAWYERS AT RISK.

A. "Corruptly Persuades"

The Fifth Circuit interpreted 18 U.S.C. § 1512(b)(2) to criminalize the act of persuading another to alter, destroy, conceal, or withhold evidence from an official proceeding, not yet commenced, with the intent of impeding fact-finding in that proceeding. In reading the statute expansively to reach the legal services at issue in this case, the court potentially swept in a broad range of attorney conduct.

Section 1512(b)(2) makes it a crime to "*corruptly persuade*[] another person" with intent to "induce any person to . . . withhold a record, document, or other object from an official proceeding; [or] alter, destroy, mutilate, or conceal an object with intent to impair the object's integrity or availability for use in an official proceeding . . . ." 18 U.S.C. § 1512(b)(2)(A)&(B) (emphasis supplied). The district court, in instructing the jury here, defined the term "corruptly persuade" to mean "having an improper purpose," which in turn the court defined as "an intent to subvert, undermine, or impede the fact-finding ability of an official proceeding." Pet. App. 48a. As Andersen demonstrates in its petition for a writ of certiorari, these jury instructions essentially read the word "corruptly" out of the statute and conflate "improper conduct" with the intent to make evidence unavailable to an official proceeding. In other words, the government can prove "corrupt" persuasion merely by satisfying another requirement of the statute (intent to induce another to withhold, alter, destroy, mutilate, or conceal evidence).

The Fifth Circuit's decision tries, but fails, to show that the two intent requirements are *not* strictly identical. *See* Pet. App. 21a-22a. (distinguishing intent to induce another to make document unavailable and intent to hinder fact-finding ability of proceeding, which implies greater "degree of personal culpability"). Yet the realities of this case highlight the futility of the court's exercise in wordplay: if a lawyer or client can be guilty of subverting, undermining, or impeding the fact-finding function of an investigation simply by discussing lawful methods of disposing of documents or editing internal drafts, then *any* attempt to persuade a person to take the steps listed in the statute may be found to be corrupt. Indeed, if to "impede" an investigation is to "hold [it] up," as the Fifth Circuit defines the term, Pet. App. 22a, any action intended to reduce the availability of information and make investigators look elsewhere would constitute a crime.[2]

B. Lawyers at Risk

As a result of the Fifth Circuit's decision, legal advice previously considered unexceptional may now be criminal. Advising a client to edit a memorandum, proposing a new document retention policy, persuading counsel for a witness to interpret a subpoena narrowly – all may well reflect a desire to withhold or conceal evidence from an official proceeding. Hence, all are "corrupt" under the Fifth Circuit's decision, even if the lawyer has a sound legal basis for each piece of advice rendered. As a result of the ruling below, which effectively reads the term "corruptly" out of Section 1512(b), the act of persuasion – including the process of lawyering itself – is now on par with "intimidation" and "threat[s]." These forms of conduct are prohibited, provided

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[2] The "impede" prong of the jury instruction defining "an improper purpose" was added at the request of the government, over the objection of Andersen. Pet. App. 22a.

that the actor has the intent to withhold, alter, destroy, or conceal evidence from an official proceeding. The court of appeals' reading of the statute stretches the concept of witness tampering beyond reasonable bounds.

This case demonstrates precisely what is at stake. To a significant extent, the government's presentation focused on the conduct of Andersen's in-house lawyer, who advised others in the company to comply with the document retention policy and who edited a draft internal memorandum. According to press accounts, the jurors unanimously agreed that the lawyer had "corruptly persuaded" others to withhold evidence. *See, e.g.*, Jonathan Weil et al., *Auditor's Ruling: Andersen Win Lifts U.S. Enron Case*, Wall St. J., June 17, 2002, at A1; Mary Flood, *The Andersen Verdict; Decision by Jurors Hinged on Memo*, Hous. Chron., June 16, 2002, at A1. In fact, the jurors focused not on the document retention policy, but on the lawyer's proposed edits to the memorandum – activity that lawyers engage in every day. *Id.*

Indeed, the ruling of the court of appeals puts lawyers more broadly at risk.

First, the Fifth Circuit's interpretation of the term "corruptly" likely applies to other provisions of Section 1512, which reach far beyond the destruction or alteration of documents. Under Section 1512(b)(1), it is unlawful to "corruptly" persuade another person with the intent to influence, delay, or prevent the testimony of any person in an official proceeding. Under Section 1512(b)(3), it is unlawful to "corruptly" persuade another person with the intent to delay or prevent the reporting of a possible federal offense to a law enforcement officer. Under Section 1512(c)(1), whoever "corruptly" alters, destroys, mutilates, or conceals a record, document, or other object, or attempts to do so, with the intent to impair the object's integrity or availability for use in an official proceeding, is subject to criminal liability.

Under Section 1512(c)(2), whoever "corruptly" obstructs, influences, or impedes any official proceeding, or attempts to do so, is subject to criminal liability. If acting "corruptly" means nothing more than taking steps with an intent "to impede" an investigation, criminal defense counsel and in-house lawyers face the risk of investigation, prosecution, and imprisonment for performing many of their day-to-day responsibilities.

Second, the court below held that the smallest dose of "corrupt" intent is sufficient to taint the defendant's conduct. The district court defined "corruptly" as having "*an* improper purpose" and expressly directed the jury that "[t]he improper purpose need not be the sole motivation for the Defendant's conduct so long as the Defendant acted, at least in part, with that improper purpose." Pet. App. 48a (emphasis supplied). Thus, a lawyer in the Fifth Circuit could have numerous legitimate motives for an act of persuasion – preserving the attorney-client privilege, complying with ethical obligations, testing the legal bases of the government's claims – but if she also has the intent to hold up an investigation as a third or fourth order goal, she has potentially committed a crime.

Third, the broad sweep of the term "official proceeding" in Section 1512 multiplies the opportunities to ensnare lawyers, and thereby to intrude on the zealous representation of their clients. Section 1512 expressly provides that the official proceeding "need not be pending or about to be instituted at the time of the offense." 18 U.S.C. § 1512(f)(1). The district court declined to instruct the jury, as Andersen requested, that an official proceeding had to be "ongoing or . . . scheduled to be commenced" or even that the corrupt persuader must have "had in mind a particular proceeding that it sought to obstruct." Pet. App. 26a. The court of appeals seemed to sense the potential for havoc in its expansive reading of the statute, conceding that Andersen's position was "not without force" and that perhaps "a

defendant's intent to impede a proceeding [should] have some limiting sights." Pet. App. 27a. But the court provided no such "limiting sights." It upheld the district court's instruction, leaving lawyers potentially liable for tampering whether there are "investigators around the corner," Pet. App. 25a, or even anywhere on the horizon.

As argued below, the Fifth Circuit's reading of Section 1512(b) intrudes on a broad range of conduct that is part of the traditional defense of criminal cases. As a result of the conflict between Circuits discussed in Andersen's petition, many lawyers may be inclined to follow the safest course of action and avoid giving any advice that might expose them to criminal investigation. The Court should correct the erroneous ruling below. The integrity of the criminal justice system is at stake.

II. THE FIFTH CIRCUIT'S INTERPRETATION OF "CORRUPTLY PERSUADES" WILL CHILL THE ZEALOUS REPRESENTATION OF CLIENTS.

A. An Attorney's Role as Zealous Advocate

A lawyer has a duty to advocate zealously on behalf of a client within the boundaries of the law. *See, e.g.*, *Penson v. Ohio*, 488 U.S. 75, 84-85 (1988) ("[I]t is through counsel that all other rights of the accused are protected . . . . [F]orceful advocacy . . . ensure[s] that rights are not foregone."). Indeed, the need for forceful and vigorous advocacy is of paramount importance to our adversary system of justice. *See id.* As described by the Ninth Circuit, "[Z]ealous advocacy is the attorney's ideal. Hard-fought, energetic and honest representation is at the bedrock of our judicial process." *Yagman v. Baden*, 796 F.2d 1165, 1182, *modified*, 803 F.2d 1085 (9th Cir. 1986), *cert. denied*, 484 U.S. 963 (1987).

In order to pursue "zealous" representation of any kind, a lawyer must know the boundaries between advocacy and obstruction. The Fifth Circuit's decision blurs these lines and will deter defense attorneys from doing their jobs the way they should. Criminal defense lawyers, uncertain of the reach of Section 1512 and how a prosecutor might perceive their conduct, may draw back from legitimate and zealous advocacy for their clients. As one legal scholar noted, "What makes the risk of overdeterrence particularly troubling is that, in a criminal case, the rendition of zealous representation is not simply desirable and encouraged by the law, but to some extent constitutionally mandated." Bruce A. Green, *The Criminal Regulation of Lawyers*, 67 Fordham L. Rev. 327, 329 (1998). The Fifth Circuit's opinion will both chill a lawyer's advocacy and advice and sacrifice the rights of the accused. *Cf. United States v. Seale*, 461 F.2d 345, 367 n.44 (7th Cir. 1972) ("[P]unishing conduct where the intent to be insubordinate is not clear, might very well have the result of deterring an attorney of less courage and experience from doing his full duty to his client.") (internal quotation marks and citations omitted).

It is the essence of our adversary system that many strategies legitimately developed and executed by criminal defense lawyers "impede the fact-finding ability" of a government investigation. Kenneth Mann, *Defending White Collar Crime* 5 (1985) ("[T]his is the central theme of the white-collar crime defense function, the defense attorney works to keep potential evidence out of government reach by controlling access to information."). In blurring critical lines and making such tactics potentially criminal, the decision below can affect lawyers in many predictable ways. For example:

- A client possesses critical (and exclusive) information in a case being investigated by the government and likely to proceed to the grand jury stage.

Investigators request an informal interview and the lawyer advises the client to refuse to cooperate. The client follows this advice and the government never learns the critical facts. Under the Fifth Circuit's reasoning, the lawyer's advice would potentially violate Section 1512(b)(2)(A) because he "induce[d] [a] person to . . . withhold testimony . . . from an official proceeding."

- An in-house attorney is asked to review a draft report that must be sent to the SEC. The lawyer and client are well aware that after the report is issued, the government will likely use it in an anticipated investigation. The lawyer suggests changing the language of the draft to exclude factual information that is not technically required in the report, but which he knows would greatly assist the government's fact gathering. The client deletes the offending language. The lawyer's advice would "cause . . . [a] person to . . . alter . . . an object," potentially in violation of Section 1512(b)(2)(B).

- A client corporation receives a grand jury subpoena for documents as part of an antitrust investigation. The lawyer advises the client that certain documents, such as the personal calendar of a company executive, are personal documents and not corporate documents, and hence are not responsive to the subpoena even though they contain relevant information. As a result, the client does not produce documents that would help the government build its case. The lawyer's advice would potentially violate Section 1512(b)(2)(B) because it "cause[d] [a] person to . . . withhold . . . [a] document . . . from an official proceeding."

- A client is subpoenaed before a grand jury. She has relevant information but she is concerned about embarrassment or perhaps unrelated civil consequences should the information ever become public. Her lawyer counsels her not to volunteer any information, to answer only the question asked, and to interpret the scope of each question as narrowly as possible. The client follows the advice. The government fails to ask the right questions and never learns the information that she does not volunteer. Again, the lawyer's advice has "induced" the withholding of testimony from an official proceeding, potentially in violation of Section 1512(b)(2)(A).

Under the Fifth Circuit's opinion, these routine judgment calls expose the attorney to potential criminal liability. The attorney has devised strategies and "persuaded" a client to follow them for the purpose, in part, of preventing the government from learning important factual evidence. Under the jury instruction approved by the Fifth Circuit, any purpose to "impede" the fact-finding mission of a government investigation is corrupt. It is no defense that the conduct that the attorney recommends is itself legal, or that the attorney believed in good faith that his or her conduct conformed to the law. In this case, the creation and execution of Andersen's document retention policy was also legal. Andersen employees could have followed the policy themselves, because no formal proceeding had yet commenced, yet a lawyer's advice that they do so becomes "corrupt" and criminal.

The Fifth Circuit's overbroad interpretation of the obstruction statute all but erases the line between zealous advocacy and obstruction, making it impossible for a lawyer intelligently to ascertain where his constitutional and ethical duties as an effective advocate end, and his exposure to criminal liability for obstruction of justice begins.

B. Chilling the Attorney-Client Relationship

Even assuming the government would refrain from exercising its prosecutorial discretion in all of the circumstances described above, the chilling effect of the Fifth Circuit's decision will adversely affect the attorney-client relationship. Lawyers who are uncertain of where the outer boundaries lie will shy away from zealous representation, and may fail to carry out legal and other important strategies on behalf of their clients for fear of their own personal liability. Indeed, courts have reversed convictions when defense counsel faced personal consequences far less severe than a potential conviction under Section 1512(b), which can result in fines and imprisonment of up to 10 years. 18 U.S.C. § 1512(b).[3]

The Fifth Circuit's decision also risks compromising the attorney-client privilege. For more than one hundred years, this Court has recognized that the "administration of justice" depends on the ability of individuals seeking legal assistance to confide in an attorney without the "apprehension of disclosure." *Hunt v. Blackburn*, 128 U.S. 464, 470 (1888). Commentators likewise have acknowledged that confidentiality is the bedrock of the attorney-client relationship. *See, e.g.*, ABA/BNA Lawyer's Manual on Professional Conduct, No. 269 at 55:302 (2004) ("[C]onfidentiality facilitates the fact-finding process that is critical to representation and also has the effect of

[3] *See, e.g., Walberg v. Israel*, 766 F.2d 1071 (7th Cir.), *cert. denied*, 474 U.S. 1013 (1985) (reversing defendant's conviction when lawyer's desire to receive future appointments from trial judge may have prevented defense counsel from pursuing vigorous defense); *United States v. Ah Kee Eng*, 241 F.2d 157, 161 (2d Cir. 1957) (recognizing potential for injustice when judge personally belittles defense counsel's positions because "[a] less experienced advocate might well have trimmed his sails . . . and thus have jeopardized the rights and the proper interests of a defendant on trial for a serious felony").

encouraging early legal consultation.") (citing Model Rule of Prof'l Conduct R. 1.6 cmt.). A client's confidences have been protected both by the attorney's ethical duty of confidentiality and by the evidentiary privilege afforded to attorney-client communications.

The Fifth Circuit's interpretation of the tampering statute expands a federal prosecutor's grounds for inquiring into attorney-client communications.[4] Now, a prosecutor is empowered to issue a subpoena on the allegation that an attorney "corruptly persuaded" his or her client to "impede the fact-finding ability" of a potential investigation. Careful lawyers will have to consider whether their defense strategy will protect their client's interest or will result in the disclosure of confidential communications.

The prospect that the defense counsel's adversary in a criminal case can investigate the conduct of the defense, including subpoenaing counsel before the grand jury, will dramatically alter, or chill, the attorney-client relationship. *See* ABA/BNA Lawyer's Manual on Professional Conduct, No. 269 at 55:1301 (2004). The looming possibility of a subpoena could well make attorneys even more cautious in representing their clients. Indeed, a lawyer would be ethically bound in many cases to advise the client of this possibility that defense conduct may come under investigation, with the consequence that the client may wonder whether the lawyer's advice is tainted by personal concerns and may choose not to speak candidly with the

[4] Such intrusion into attorney-client confidences has been justified by extreme circumstances such as an attorney's deliberate effort to tamper with witnesses, destroy subpoenaed materials, or engage in fraud upon the court. *See, e.g., Osborn v. United States*, 385 U.S. 323 (1966); *United States v. Myers*, 692 F.2d 823 (2d Cir. 1982), *cert. denied*, 461 U.S. 961 (1983); *In re Doe*, 662 F.2d 1073, 1080-81 (4th Cir. 1981), *cert. denied*, 455 U.S. 1000 (1982).

attorney. Unless this Court takes this case and clearly demarcates the boundaries of Section 1512, the fear engendered by a vague standard, haphazardly applied, could well undermine fundamental tenets of the American system of justice.

III. THE SAFE-HAVEN PROVISION OF SECTION 1515(C) DOES NOT ELIMINATE THE CHILL ON ZEALOUS ADVOCACY CREATED BY THE FIFTH CIRCUIT'S OPINION.

The so-called "safe-haven" protection of Section 1515(c) does not dissipate the chilling effects of the Fifth Circuit's expansive interpretation of Section 1512(b). On its face, Section 1515(c) provides a safe haven for "lawful, bona fide, legal representation services in connection with or anticipation of an official proceeding." 18 U.S.C. § 1515(c). Some courts have suggested that this provision "is a complete defense to obstruction of justice." *United States v. Kloess*, 251 F.3d 941, 946 (11th Cir. 2001); *United States v. Kellington*, 217 F.3d 1084, 1098 (9th Cir. 2000). The Eleventh Circuit has stated that "one who is performing bona fide legal representation does not have an improper purpose. His purpose – to zealously represent his client – is fully protected by the law." *Kloess*, 251 F.3d at 948. That *should* be the law. But it is not in the Fifth Circuit. Section 1515(c) does not dispel the chill on effective advocacy that the court of appeals has created.

The Fifth Circuit's reading of Section 1512(b) creates a circularity that essentially nullifies the safe haven provision. Section 1515(c) applies only to "lawful, bona fide" representation. Under the jury instructions upheld by the court below, however, any advice rendered with the intent to "impede" an investigation is "improper"; that which is improper is "corrupt"; and that which is corrupt is not lawful. As already noted, many accepted strategies employed by

lawyers are intended to "impede" factual investigation. Moreover, under the Fifth Circuit's standard, if there were other motivations for the strategy, and even if those other motivations were predominant, any sliver of intent to impede creates a lingering taint. Defense counsel thus cannot be certain that prosecutors will refrain from investigating and prosecuting otherwise bona fide legal representation that impedes the fact-finding ability of an official proceeding – despite the illusory promise of Section 1515(c).

The result is that counsel may well be hindered from zealously protecting their clients' interests for fear that their advocacy could create liability for themselves. This would staunch the essential flow of information between attorney and client.

CONCLUSION

The petition for certiorari should be granted, and the conviction should be reversed.

Respectfully submitted,

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